NO. 92-1231

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

LEMORE ALLEN

Petitioner,

versus

SOUTH CENTRAL BELL,

Respondent.

Petition for Writ of Certiorari To The
United States Court of Appeals For The Fifth Circuit

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40 pp

ISSUES PRESENTED

1. In a mixed-motives case of retaliatory discharge did the Fifth Circuit err by holding:

> The question is whether Appellant would have been fired for taking the documents even if he had not been involved in the lawsuit against Bell. The Court must, therefore, **balance the motives** to determine whether the legitimate reason for termination would alone have resulted in the same decision. (Emph. added.)

especially after earlier finding that there was essentially only **one** (1) motive available for balancing:

> [T]he problem in determining causation in this is that Allen's suit and his termination are **inherently interrelated**. Allen was charged with having turned over the estimate front sheet and log book to his attorney, and therefore, Allen's legal action must have played a role in Glenn Andrews' decision to fire him. (Emph. added.) Carter, et al. v. SCB, 912 F.2d 832, 843 (1990).

2. In its first opinion the Fifth Circuit instructed that SCB would have to prove that it would have fired petitioner for taking certain documents even if he had not been involved in a lawsuit. Without citation to the record, the Fifth Circuit then restated its finding in its instructions to the trial court on defendant's burden of proof in these terms:

> By this we do not mean that the magistrate may not consider how Allen used the document...[T]hey do have to show that dismissal was an appropriate remedy for the personal use of proprietary information. This information was used against the company's interests; the magistrate may consider this as well. Carter, at 843.

In its current (second) opinion, the Fifth Circuit affirmed these "findings" now also made by the trial court. (A-15.)

Was it error for the Fifth Circuit to substitute a "generic", non-lawsuit, and legal motive for an illegal motive for consideration by the magistrate? For the trial court to make and use this finding? For the Fifth Circuit now to affirm it?

3. Where the magistrate's findings omit all reference to: (a) the company's testimony that it did not consider firing Appellant in the absence of his lawsuit and to documents related to that testimony; (b) prior retaliation; (c) Allen's 14 year unblemished record; (d) the documents' minimal importance to SCB; and (e) the credibility of Chavers, Allen's supervisor and chief accuser, are the findings adequate? clearly erroneous?

LIST OF PARTIES

The caption of the case in this Court contains the names of all parties to the proceeding in the Court of Appeals in so far as its judgment is sought to be reviewed.

TABLE OF CONTENTS

Page

ISSUES PRESENTED i

LIST OF PARTIES iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES v

DECISIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATUTE PRESENTED FOR REVIEW 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 4

ARGUMENT 5

CONCLUSION 13

APPENDIX A - Trial court opinion A-1

APPENDIX B - Appellate opinion B-1

APPENDIX C - Denial of rehearing C-1

TABLE OF AUTHORITIES

Page

Cases

Anderson v. City of Bessemer City,
109 S.Ct. 1504 (1985) 12

Carter, et al v. SCB, 912 F.2d 832 (5th Cir. 1990) ..... i, ii, 2

Mt Healthy City School Dist. Bd. of Education v.
Doyle, 97 S.Ct. 568 (1977) 4, 5, 6

NLRB v. Transportation Management Corp.,
103 S.Ct. 2469 (1983) 4, 5, 6, 7

NLRB V. Wright Line, 662 F.2d 899 (1st Cir. 1981) 4, 5

Price Waterhouse v. Hopkins,
109 S.Ct. 1775 (1989) 1, 4, 5, 6, 7, 8

Redditt v. Miss. Extended Care Centers, Inc.,
718 F.2d 1381 (5th Cir. 1983) 10

DECISIONS BELOW

The unreported decisions of the trial court and U.S. Fifth Circuit Court of Appeals are reproduced in the appendix. Likewise the denial of petition for rehearing.

STATEMENT OF JURISDICTION

The judgement (opinion) of the Court of Appeals was entered on September 21, 1992. A petition for rehearing was denied on October 19, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254 (1). Jurisdiction in the trial court was based on 28 U.S.C. sec. 1343.

STATUTE INVOLVED

42 U.S.C. sec. 2000(e): It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF THE CASE

This petition arises out of the Fifth Circuit's earlier remand in a mixed-motives retaliatory discharge case under Price Waterhouse v. Hopkins, 104 S.Ct. 1775, 1786 (1989)(plurality). The Court found that

> [T]he problem in determining causation in

> this context is that Allen's [Appellant's] suit and his termination are **inherently interrelated**. Allen was charged with having turned over the estimate front sheet and log book to his attorney, and therefore, Allen's legal action must have played a role in Glenn Andrews' decision to fire him. Carter, at 843. (Emph. added.)

The Fifth Circuit did not cite **direct** evidence (testimony and exhibits) on SCB's mixed motives. (The trial court had made no mention, i.e, no findings, whatsoever of mixed motives.)

The Fifth Circuit then stated that "the burden shifts to the employer to prove that he would have made the same decision regarding the employee even if he had not taken the illegitimate reason into consideration." Carter, at 843.

Accordingly, remand was made to allow SCB to:

> prove, by a preponderance of the evidence, that it would have fired Allen [Appellant] for taking the documents even if Allen had not been involved in litigation against SCB.

The Fifth Circuit then made "findings" as to the use of the documents separate from the lawsuit:

> By this we do not mean that the magistrate may not consider how Allen used the document.... [T]hey do have to show that dismissal was an appropriate remedy for personal use of proprietary information. This information was used against the company's interests; the magistrate may consider this as well. Carter, at 843.

Neither party applied for writs as to this part of the decision (Carter, et al. v. SCB, 90-1461, denied) and SCB objected to reopening the matter for new evidence on this aspect.

On remand the magistrate adopted the proposed findings of SCB almost verbatim. He deleted only reference to SCB's claim that its manager who fired Allen had given no testimony linking the motives. The magistrate's opinion relied on the Fifth Circuit's above "motive" findings, but attached no significance to its findings that the motives were **"inherently interrelated."** Plaintiff's case was dismissed:

> It must be concluded... that Glenn Andrews' **main reason** for firing Allen was based on the principles of dereliction of duty and untrustworthiness. (A-15.) (Emph. added.)

Allen again appealed to the Fifth Circuit. As to the issue whether SCB met its burden of proof, his appeal was denied in the following manner:

> The question is whether Appellant would have been fired for taking the documents even if he had not been involved in the lawsuit against Bell. The Court must, therefore, **balance the motives** to determine whether the legitimate reason for termination would alone have resulted in the same decision....
>
> We find that the magistrate judge employed the **right** test and the evidence submitted is more than sufficient to sustain Bell's burden. (B-3.) (Emph. added.)

SUMMARY OF THE ARGUMENT

1. The Fifth Circuit approved the trial court's use of the balancing ("dominant motive") test to weigh motives as the proper method of determining whether Bell would have fired Allen in the absence of a retaliatory motive. This approval conflicts with Mt Healthy v. Doyle, 97 S.Ct. 568, 576 (1977); NLRB v. Transportation Management Corp., 103 S.Ct. 2469, 2475 (1983), citing NLRB v Wright Line, 662 F.2d 899, 903 (1st Cir. 1981)("...abandoning...dominant motive language"); and Price Waterhouse v. Hopkins, 109 S.Ct. 1775, 1792 (1989).

These cases require weighing probabilities, i.e., weighing the evidence that the employer would have made the same decision without the illegal motive as he made with it. To put it differently, that he would have made the same decision under either fact scenario and would not have imposed lesser discipline or none at all. Balancing the motives does not eliminate the influence of the illegal motive which is precisely what is required.

2. Transportation Management, at 2475, requires that the legal motive be "separate" from the illegal motive; Price Waterhouse, at 1792, requires it to "stand alone." The Fifth Circuit, finding the motives "inherently interrelated", apparently recognized Bell's dilemma, particularly in view of the prospective balancing test which it did not mention in the first opinion, but approved in its second. The Court made a finding, unsupported in the record, of a separate legal motive not related to Allen's use of the documents in his lawsuit. That finding was a generalized one of a "generic" adversarial use of the documents:

> By this we do not mean that the magistrate may not consider how Allen used the document...

> [T]hey do have to show that dismissal was an appropriate remedy for personal use of proprietary information. This information was used against the company's interests; the magistrate may consider this as well. Carter, at 843.

However, this "motive" is not in the record and may not be considered. Motives must exist and be relied on in the record. Price Waterhouse, at 1791. Since there is no such evidence in the record, this "motive" is pure conjecture.

3. The Fifth Circuit approved findings that are inadequate and clearly erroneous.

Even under the balancing test and certainly under Mt Healthy and following cases, the illegal motive, prior "bad acts" of retaliation, etc., must be considered. This the magistrate and the Fifth Circuit failed to do, perhaps because the magistrate's opinion is "scanned" almost verbatim from Bell's proposed findings. Consideration of this evidence shows that the judgment is clearly erroneous.

ARGUMENT

1. The trial court committed legal error - it applied the wrong test. Since Mt Healthy v. Doyle, supra, the correct test has not been balancing motives in order to determine the "dominant motive" (here the "main reason"), but determining whether the employer has shown by a "preponderance of the evidence that it would have reached the same decision...even in the absence of the protected conduct." at 576.

As stated in another mixed-motives case, Wright Line at 903, cited with approval in Transportation Management Corp., at 2472-75:

> In cases since Mt Healthy, we have relied on its expression of the 'but for' standard, **abandoning** our earlier dominant motive language... We came to recognize that the existence or not of a causal link between union activity and the employee's injury...was **most accurately** determined by asking whether the discharge would have occurred 'but for' the protected activity.

Contrary to the apparent Fifth Circuit analysis, the preponderance test does not equate to balancing the motives. Rather, what is weighed is the likelihood that the employer would have "reached the same decision even if, hypothetically, he had not been motivated by a desire to punish plaintiff..." (Transportation Management, at 2475) against the likelihood that the employer made its decision only in the mixed presence of the illegal motive. The likelihood that the employer would have made the same decision on the illegal motive alone may also be profitably considered. Probabilities, not motives, are weighed. The balancing test weighs motives and therefore does not eliminate the influence of the illegal motive in determining whether the employer would have made the same decision without its influence.

Further, under the preponderance test (and even in the event that the balancing test is the correct test), the Fifth Circuit's application skipped a required first step - finding **separate** legitimate and illegitimate motives. In Price Waterhouse at 1792 the Court held:

> The employer must show that its legitimate reason, **standing alone**, would have induced it to make the same decision.

In Transportation Management, the Court held:

> The employer is a wrong doer; he has acted out of a motive that is declared illegitimate by the statute. It is fair that **he bear the risk that** the influence of legal and illegal **motives cannot be separated**... (at 2475.)

Because the Fifth Circuit found that the motives are **"inherently interrelated"**, Bell **can never separate the motives and cannot meet** its burden of showing (under any test) that it would have fired Allen for the legitimate motive **in the absence of an impermissible motive."** Price Waterhouse, at 1791.

2. The trial court's first opinion was silent as to whether this case were a mixed-motives case. However, in its first opinion the Fifth Circuit found that it was, but also found that the motives were **"inherently interrelated."** (See above.) This finding posed an analytical problem - the mixed motives were inseparably "fused." However, this problem was overcome when the Fifth Circuit "found" a generalized, separate motive related to adversarial use, but not related to the lawsuit. (See above.)

Conceptually at least, the trial court now had a separate, legal motive to put in the balancing scales against the retaliatory motive.

However, this ex post facto motive was never claimed by Bell at trial and is wholly without record support. Motives must exist in and be relied on in the record. As stated by this Court:

> As to the employer's proof, in most cases, the employer should be able to present some objec-

> tive evidence as to its probable decision in the absence of impermissible motive. Moreover, proving 'that the same decision would have been justified...is not the same as proving that the same decision would have been made.' (Citation omitted.) An employer may not, in other words, prevail in a mixed-motives case by offering a legitimate reason for its decision if that reason did not motivate it at the time of decision. Price Waterhouse, at 1791.

In fact, all the record evidence is to the effect that Bell never considered such a generalized, separate, legal motive, but instead considered only a combined, fused motive that was inseparably tied to the lawsuit. Under questioning by the attorney for SCB, the testimony of Glenn Andrews, the manager who fired Allen, shows this:

> Q: In deciding or in making your decision to terminate Mr Allen, did you consider or was one of the considerations the fact that he had a pending lawsuit against SCB?
>
> A: Only to the effect that it was that a lawsuit that he apparently would have - it was used in that lawsuit, the information was used against the company in that lawsuit. (Vol. 3, p.637)

This testimony shows clearly the source of the Fifth Circuit's "finding" of a generalized motive and shows just as clearly that such a motive is not present in the record. It was up to

Andrews, not the court, to stop his testimony three (3) words earlier.

Andrews also studied one case, given to him by his house counsel, which involved an employee's taking documents for use in a lawsuit against the company. His testimony about that case shows further that the Fifth Circuit and trial circuit have gone beyond the evidence:

> Q: ...Is there anything else that you did, not within the investigation but outside of the investigation?
>
> A: Well, I—with the matter of a document of this type, I had not dealt with it before and I had requested the personnel legal compliance person to assist me in determining if there had been any and if there was any precedence (sic) in this matter...(Vol, 3, p. 624)
>
> Q: ...(W)hat was the reason for your conversation with her?
>
> A: I had had no previous experience with this particular type situation.
>
> Q: And when you say this particular situation, what are you referring to?
>
> A: Where an employee had actually copied a document and used it or gave it to his attorney for possible

> use in litigation against the company. (Vol. 3, p. 625)

Because of the repeated testimony of Bell's manager under questioning by the company's attorney, it is improper for the trial court to use the "sanitized" finding under any analysis. It is pure conjecture.

3. For findings to be adequate, they must include and then clearly choose between conflicting evidence. Redditt v. Miss. Extended Care Centers, Inc., 718 F.2d 1381, 1386 (5th Cir. 1983).

There was indeed evidence that conflicted with and questioned Bell's contention that it would have made the same decision. However, none of it was considered.

First, as already noted, there is the testimony of Andrews which shows that there was never a separate, legal motive on which it can be hypothesized that he might have made the same decision.

Second, there is evidence of prior retaliation. When taken together, these prior "bad acts" show that Bell - disregarding the mixed, illegal influence - would have been more likely to have fired Allen out of the **illegal motive alone**, than out of the legal motive alone. A good case can be made that the illegal motive alone drove SCB and that the purported legal motive had nothing to do with the firing. The magistrate did not examine this aspect.

Briefly, these other acts of retaliation follow.

In April, 1985, Allen complained in a letter about the selection of another for the Planning department; on May 1, his then supervisor told him he would be "blackballed" because of the letter. Later in May, Allen filed an EEOC charge; his next quarterly rating from his supervisor was his lowest ever.

Allen's annual rating for 1985, given on January 1, 1986 criticized his productivity; his 1984 rating stated: "He is very productive, cost, and quality oriented." In early 1986, Chavers (now his supervisor) rerouted three work projects away from Allen.

In March, 1986 Allen sued and in late June he wrote another critical letter. In July, Chavers used a document he knew bore Allen's forged signature in Allen's work review. In mid-August, the disputed documents were used in depositions; in late September, Chavers summoned Allen to an investigation of his accident report which Allen had filled out as instructed by another company supervisor.

Third, there is the lack of importance that Bell attached to the documents, e.g., its delay of a month before investigating, failure now or since to move to protect or retrieve them.

Fourth is the magistrate's omission of any credibility evaluation whatsoever of Chavers, Allen's chief accuser, whose long "outraged" memo is quoted in its entirety by both the proposed findings and the trial court. There were at least four reasons to at least question Chavers' credibility. Three are explained above. The fourth goes directly to the trial court's finding that Allen's discharge had mainly to do with "dereliction of duty and untrustworthiness." If Allen's transgression were of such preponderant motivation, even considered in the abstract as found by the Fifth Circuit, why did Chavers allow Allen to continue working for almost two (2) months without restricting

his access to proprietary documents? Chavers, who committed fraud on Allen, is certainly worth a credibility check, but the magistrate paid no attention to this aspect.

Fifth, in this locale at least, Bell is not inclined toward termination in other serious cases, e.g., the B-97 incident and Chavers himself with respect to his fraud toward Allen. In addition there was another case of a fraudulent accident report in which the employee was not discharged.

At a minimum such evidence is necessary for balancing motives - something must be weighed against the legal motive and that weighing must be done in the magistrate's opinion. Under the proper "but-for" analysis, consideration of all the above items is equally necessary in order to access whether SCB would have made the same decision on the legal motive (such as it is) alone or whether, as is more likely, it would have made the same decision on the illegal motive alone or mixed with the legal motive.

Because the trial court's opinion is wholly devoid of these analyses, it is inadequate.

For the same reasons, particularly the use of a wholly conjectured motive, the judgment is clearly erroneous. Consideration of these reasons should leave this Court with the conviction that the judgment is "illogical or implausible." Anderson v. City of Bessemer City, 105 S.Ct. 1504 (1905).

CONCLUSION

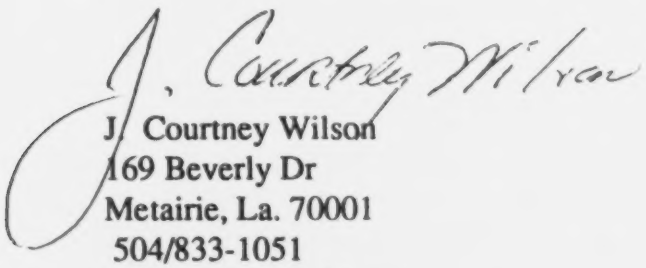
The Fifth Circuit has decided a federal question in conflict with applicable decisions of this Court. That question is the proper legal test to determine whether the employer would have made the same decision about Allen without the illegal motive as it did with the mixed motives (or the illigal motive alone). The Fifth Circuit applied the "dominant motive" balancing test; it should have applied the "but for" test under which the court weighs probabilities, not motives.

Second, the trial court's opinion rested on evidence of legal motive wholly conjectured by the Fifth Circuit with no record support. This is error.

Third, assuming such evidence exists and balancing is proper, the trial court's opinion never weighs other evidence of the probability of defendant's making the same or a different decision.

For these reasons the petition should be granted.

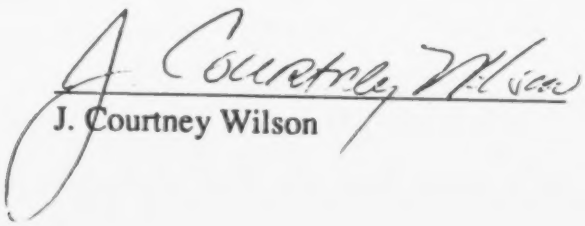
Respectfully submitted,



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Lemore Allen

CERTIFICATE OF SERVICE

I hereby certify that three copies of the above and foregoing have been forwarded to all counsel of record by depositing same in the U.S. mail, postage prepaid and properly addressed this 15th day of January, 1993.



J. Courtney Wilson

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MARY H. CARTER & TAHNELLA JACKSON	CIVIL ACTION
VERSUS	NO. 85-1861 c/w
SOUTH CENTRAL BELL TELEPHONE CO.	85-1862 SECTION: "H" (6)

Consolidated With

LEMORE ALLEN	CIVIL ACTION
VERSUS	NO. 86-1240
SOUTH CENTRAL BELL TELEPHONE CO.	SECTION: "H" (6)

JUDGMENT

The Civil Action came on for trial on a former day, was appealed and was reversed and remanded by the United States Court of Appeals for the Fifth Circuit. After considering the evidence adduced, the entire record, the applicable law and the opinion of the Fifth Circuit, the court issued written Order and Reasons for dismissal of this matter. Accordingly,

IT IS ORDERED, ADJUDGED AND DECREED that there be Judgment herein in favor of the Defendant, South

Central Bell Telephone Company, and against Plaintiff LEMORE ALLEN, DISMISSING Plaintiff's Complaint and Amended Complaints, each party to bear its own costs.

New Orleans, Louisiana, this 13th day of November, 1991.

LOUIS MOORE, JR.
United States Magistrate Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MARY H. CARTER & TAHNELLA JACKSON	CIVIL ACTION
VERSUS	NO. 85-1861 c/w
SOUTH CENTRAL BELL TELEPHONE CO.	85-1862
	SECTION: "H" (6)

Consolidated With

LEMORE ALLEN	CIVIL ACTION
VERSUS	NO. 86-1240
SOUTH CENTRAL BELL TELEPHONE CO.	SECTION: "H" (6)

ORDER AND REASONS

This Civil Action is before this Magistrate Judge on remand after reversal by the United States Court of Appeals for the Fifth Circuit, in Carter v. South Central Bell, 912 F.2d 832, 843 (1990). The Fifth Circuit remanded this Magistrate Judge's dismissal of plaintiff LEMORE ALLEN's claim of retaliatory termination by defendant South Central Bell (SCB) in violation of Title VII of the Civil Rights Act of 1964. See 42 U.S.C.A. sec. 2000e-3(s) (West 1981). The Fifth Circuit found no error in this Magistrate Judge's dismissal of ALLEN's charges of racial

discrimination. The Fifth Circuit also affirmed this Magistrate Judge's dismissal of plaintiffs' Mary H. Carter and Tahnella Jackson claims of racial harassment and constructive discharge brought under 42 U.S.C.A. sec. 1981.

The Fifth Circuit remanded ALLEN's Title VII claim of retaliatory termination for fully developed legal conclusions consistent with its opinion.[1]

---

1 The following pertinent section of the Fifth Circuit opinion in Carter v. South Central Bell, 912 F.2d 842-843, provides guiding precedence in rendering a decision in this matter:

3. Retaliatory Termination

> [13, 14] Title VII prohibits an employer from discriminating against an employee if the employee alleges that the employer has engaged in unlawful employment practices. 42 U.S.C.A. sec. 20003-3(a) (West 1981). To prove the SCB has violated this provision, Allen must show that he engaged in an activity protected by Title VII, that an adverse employment action occurred, and that there was a casual connection between the participation in the protected activity and the adverse employment decision. See McDaniel v. Temple Indep. School Dist., 770 F.2d. 1340, 1346 (5th Cir. 1985).
>
> Although the magistrate recited this test, we are uncertain how he applied it. Because of our uncertainty, we are remanding Allen's Title VII claim for fully developed legal conclusions consistent with this opinion.
>
> From our reading of the record, it appears that Allen has met the first two criteria. He did engage

After considering the entire record, the applicable law and opinion of the United States Court of Appeals for the Fifth Circuit in this Civil Action, this Magistrate Judge makes the following findings of fact and conclusions of law.

---

in a protected activity, and adverse consequences ensued, the most notable of which was the decision by Chavers to use sloppy work done by another employee in Allen's performance review. The only issue that remains is whether Allen's termination and his protected activities were casually connected.

The problem in determining causation in this context is that Allen's suit and his termination are inherently interrelated. Allen was charged with having turned the estimate front sheet and log book over to his attorney, and, therefore, Allen's legal action must have played a role in Glen Andrew's decision to fire him.

[15] In a mixed motive case such as this one, the usual sequence of proof used for Title VII cases does not resolve the problem. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-02, 93 S.Ct, 1817, 1824-25, 36 L.Ed.2d 668 (1973). The employer cannot discharge his burden simply by proffering a legitimate reason the magistrate believes, because both the legitimate reason and the illegal one played a part in the decision. Under these circumstances, the burden shifts to the employer to prove that he would have made the same decision regarding the employee even if the had not taken the illegitimate reason into consideration. See Price Waterhouse v. Hopkins, 490 U.S. 288, 109 S.Ct. 1775, 1786, 104 L.Ed.2d 268 (1989)

FINDINGS OF FACT

1. On May 24, 1986, LEMORE ALLEN filed a Civil Action against SCB alleging racial discrimination in violation of 42 U.S.C.A. sec. 1981 and 42 U.S.C.A. sec. 2000(e), et seq. ALLEN later filed two amended complaints adding a claim of retaliatory termination while his racial discrimination claims were pending.

(plurality). "[I]n multiple causation cases, where a breach of duty has been established, the common law of torts has long shifted the burden of proof to multiple defendants to prove that their negligent actions were not the 'but-for' cause of the plaintiff['s] injury." Id. 109 S.Ct. at 1797 (O'Connor, J., concurring). Furthermore, the Supreme Court has consistently shifted the burden of proof to the defendant in mixed motive cases involving constitutional violations. See Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 U.S. 222, 228, 105 S.Ct. 1916, 1920, 85 L.Ed.2d 222 (1985).

[16] Therefore, we hold that SCB must prove, by a preponderance of the evidence, that it would have fired Allen for taking the documents even if Allen had not been involved in litigation against SCB. By this, we do not mean that the magistrate may not consider how Allen used the documents. For example, SCB does not have to show that they would have fired Allen had he taken these documents home and thrown them away. But they do have to show that dismissal was an appropriate remedy for personal use of proprietary information. This information was used against the company's interests; the magistrate may consider this as well.

2. LEMORE ALLEN was hired by SCB on November 16, 1972, as an entry level associate engineer. ALLEN was the first Black to be hired as a 1-H associate engineer. After four years, ALLEN was promoted to the position of full-time engineer.

3. In 1984, ALLEN notified SCB that he was interested in obtaining a job in the planning group. The planning job was given to Barbara Johansen, a White female, in April of 1985.

4. After confirming that Johansen had been transferred to the planning group, ALLEN wrote a letter stating that he was dissatisfied with how the selection for the planner's position was made. ALLEN also file a charge with the Equal Employment Opportunity Commission (EEOC).

5. ALLEN wrote a letter to his supervisor, Phil Chavers, outlining nine areas of contention concerning his performance ratings. Chavers did not address all of ALLEN's contentions and remarked, "Everybody knows you filed the lawsuit."

6. On August 11, 1986, during the deposition of Barbara Johansen, plaintiff's lawyer produced from his filed copies of SCB's estimate front sheets which he questioned Ms. Johansen about. The estimate front sheets contained proprietary information.

7. On August 20, 1986, during the deposition of Phil Chavers, plaintiff's lawyer produced pages from SCB's job log books. The job log book contained proprietary information.

8. Lester Hooper, Operations Manager at SCB, was present during the depositions of Barbara Johansen and Phil Chavers. Hooper reported to his manager, Glenn Andrews, General Manager- Distribution Services- South, that ALLEN may have appropriated proprietary documents from SCB because Hooper observed ALLEN's lawyer, J. Courtney Wilson, with pages from SCB's job log book and estimate front sheets. Upon instructions of Glenn Andrews, John Banquer conducted an investigation of this matter.

9. John Banquer conducted an investigation and submitted his report and three memoranda. (See Plaintiff's Exhibits Numbers 35, 36, 37 & 40.) The initial investigative report was submitted to Glenn Andrews on September 26, 1986. Banquer reported the following statement rendered by Phil Chavers presented here in pertinent part:

> . . .On August 20th Lemore's attorney, J. Courtney Wilson, was in possession of certain company records which are considered proprietary in nature. Specifically, I was shown a copy of the cover sheet to estimate No. L4494, an underground cable operation at Lennox Boulevard in Gretna, and copies of two log books, showing job authorization numbers, titles, initials of the engineer, cost figures, and approval, release, and completion dates. I was extremely surprised to see these things in the hands of an outsider. Lemore, as a company engineer, has open and ready access to these company documents in the normal course of his job. Mr. Wilson asked me specific questions about certain jobs worked by Lemore and Barbara Johansen, another engineer. It was obvious by the tone and direction of the questions posed to me that Mr. Wilson was trying to determine why Barbara had received a higher rating on her evaluation than Lemore, even though he had copies of both evaluations in his possession. As I said, I was shocked to see copies of those documents in his possession, since all employee [sic] are made aware, at least annually, to safeguard company documents. All employees of my department, Lemore included,

have been told repeatedly that all information on current, past, or future jobs is not to be given to anyone outside the company. Access to, and knowledge gained from, these documents would be of great benefit to vendors, and any other outsiders. Unauthorized release of the information contained could cause great harm to the company for many reasons, not the least of which is that certain information on the copies I have just reviewed pertains to government contracts at the Algiers Naval Station, U.S. Coast Guard, and Alvin Callendar Air Field. Lemore Allen was present at the deposition, and on several occasions Mr. Wilson would stop the proceedings while he and Lemore went outside to confer on answers given by myself and others. I [sic] was then obvious to me that Mr. Wilson was in possession of these documents through his contact with Lemore. Prior to the depositions we had been asked to supply other information, such as evaluations, ratios of black to white employees, training records, planning titles, etc., but nothing pertaining to specific job authorization numbers. I am outraged that information on all of these jobs had been given to an outsider. Certain information on placing the cable at the Navy could be used to interrupt service to their security building, and loss of confidentiality could be of great harm to the base and our company.

Phillip W. Chavers
9/23/96 2:30 p.m.

10. John Banquer attempted to interview ALLEN on September 24, 1986. Banquer showed ALLEN copies of the estimate front sheets and the log books. When questioned as to whether ALLEN had any information about how the documents came to be in the possession of ALLEN's lawyer, an authorized person, ALLEN's response was a refusal to make a statement concerning the inquiry until he could speak to his attorney.

11. Upon receipt and review of the security investigation, Glenn Andrews concluded that termination of ALLEN was appropriate based upon the available information. After learning that ALLEN's lawyer had sent word to SBC that if it wished to question anyone about any documents in his possession, SCB should question him, Glenn Andrews requested that the security investigation be reopened on October 8, 1986. When investigators attempted to interview ALLEN's lawyer on October 16, 1986, he not only refused to answer any questions relative to his possession of SCB's proprietary documents, but he arranged to serve the investigator with a subpoena duces tecum when the investigator arrived at ALLEN's lawyer's office. South Central Bell's (SCB's) security investigation was concluded after this incident. On October 21, 1986 ALLEN was terminated from his employment with SCB because it was believed that he gave SCB's proprietary documents to his lawyer. Such activity is prohibited by SCB rules and regulations.[2]

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2 See Plaintiff's Exhibit No. 32, Exhibit A.

You shall not divulge to any unauthorized person any proprietary information or any trade secret or company or any affiliated or associated company of the Bell System which may come to your attention during the period of your employment by company... Proprietary information many consist of, among other things, scientific or technical data, circuit lay-outs, cable and pair information, credit card number plans, designs, processes, procedures, formulae, business plans, documents, financial information, data processing infor-

12. ALLEN engaged in a protected activity by filing his complaint against SCB while he was employed by SCB.

13. Adverse consequences ensued as a result of ALLEN's exercise of a protected activity.[3]

CONTENTIONS OF THE PARTIES

ALLEN contends that SCB cannot prove that it was legal to fire ALLEN because it cannot prove from the record of these proceedings that SCB fired ALLEN absent his lawsuit for "some other articulated, specified adversarial use of the documents." It is also argued that SCB offered no evidence whatsoever as to what it would have done about ALLEN's violation of the proprietary documents rule if he had not used the documents in a lawsuit, but had instead given them to a competitor. Finally, ALLEN argues that if it was legal to fire ALLEN, SCB did not prove that ALLEN's firing was appropriate.

South Central Bell argues that the evidence of these proceeding show that ALLEN was an active SCB management-

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mation, marketing research study data, cost studies and/or any other material or information which if divulged to unauthorized persons might adversely affect company and/or other Bell System subsidiaries...Any information of the type described above or any document if marked company private, company restricted, or marked in any manner indicating that it is for Bell South or company use only should not be divulged to any authorized person.

[3] Phil Chavers refused to address all of ALLEN's inquiries concerning why he did not get the planning job. Chavers also assigned ALLEN a rush assignment when ALLEN was scheduled to go on vacation. ALLEN was allowed to take his vacation and the assignment was given to another employee to complete. The assignment was completed with errors. Although Chavers knew that another employee had completed the assignment, Chavers used the erred assignment in his quality review of ALLEN.

level employee who violated his obligations and responsibilities to SCB by knowingly and secretly providing to an unauthorized person (ALLEN's lawyer) various SCB's proprietary documents ALLEN knew or believed may be used in a way harmful to SCB's interests. ALLEN refused to cooperate with SCB's security investigation. Finally, it is argued that Glenn Andrews' termination of ALLEN was appropriate as the preponderance of the evidence demonstrated that such an employee engaged in the use and dissemination of proprietary documents to an unauthorized person would be dismissed regardless of that employee's lawsuit against SCB.

CONCLUSIONS OF LAW

1. To establish a prima facie case of retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. sec. 2000(e)-3(a) (West 1981), ALLEN must prove that he engaged in an activity protected by Title VII, that an adverse employment action occurred, and that there was a causal connection between the participation in the protected activity and the adverse employment decision. See McDaniel v. Temple Indep. School Dist., 770 F.2d 1340, 1346 (5th Cir. 1985) cited in Carter v. South Central Bell, 912 F. 2d 832, 842-843 (5th Cir. 1990).

2. The United States Court of Appeals for the Fifth Circuit in Carter v. South Central Bell, 912 F.2d 832, at 842 (1990), concluded that the only issue remaining in to be decided in this Civil Action is whether ALLEN's termination and his protected activities were casually connected. The Fifth Circuit also acknowledged the problem in determining cassation in the context of ALLEN's lawsuit and his termination since ALLEN's legal action must have played a role in Glenn Andrews (sic) decision to fire ALLEN.

3. Under the facts of this case, the burden of proof is upon the defendant employer, South Central Bell Telephone

Company, to prove that it would have made the same decision, i.e., termination, regarding plaintiff LEMORE ALLEN, even if it had not taken into consideration the pending suit filed by ALLEN. Carter v. South Central Bell, 912 F. 2d 832, 843 (5th Cir. 1990); Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 1786; 104 L.Ed. 2d 268 (1989). In other words, South Central Bell will not be liable if it has proven by a preponderance of the evidence that it would have come to the same decision regarding plaintiff ALLEN, irrespective of or in the absence of this employee's pending lawsuit. Carter, supra; Price Waterhouse, supra.

4. South Central Bell has met its burden of proof in showing by a preponderance of the evidence that it would have reached the same disciplinary decision as to ALLEN even in the absence of ALLEN's pending lawsuit. This evidence consisted of the following:

a) The SCB booklet entitled "A Personal Responsibility" (Defendant's Exhibit No. 14), which Allen acknowledged as having read and understood (Defendant's Exhibit No. 15), clearly admonished employees such as Allen that discipline up to and including termination could result from the disclosure of documents containing proprietary information to unauthorized persons;

b) The estimate front sheet and the log books in the possession of J. Courtney Wilson contained proprietary information;

c) Wilson was not an authorized person to have custody or possession of such documents;

d) It was not unreasonable for SCB to conclude that Wilson obtained these documents from Allen, in light of Allen's access to these records, his refusal to cooperate with the

subsequent security investigation, or to offer any other plausible source of the records and Wilson's refusal to provide any information as to how they came into his possession;

e) The factors motivating Andrews consisted not only of a reasonable conclusion that the proprietary information was provided to Wilson by Allen, but also by Allen's refusal during the subsequent Security Department Investigation to cooperate with the investigation or to offer any other valid explanation as to how these documents came into Wilson's possession. Allen was still at the time a management employee of SCB with access to a wide assortment of classified documents and documents containing proprietary information. (See Transcript of Trial, Volume 3, pp. 628-629.) Andrews was, therefore, confronted with the situation of an active company employee who had turned over proprietary information to an unauthorized person; an employee who had access to other proprietary information and who refused to cooperate with the company's reasonable efforts to determine how the unauthorized person obtained this information which was sought to be used against the company's interests.

The situation was analogous to one in which an active employee has secretly provided a company's competitor with proprietary information which the competitor then seeks to use to entice customers away from the company. To compound this situation, the employee then refuses to cooperate with an investigation to determine how the competitor

obtained the proprietary information;

f) The B-97 incident, in which Andrews had to decide the appropriate discipline for several Black and White employees, is not a comparable case for several reasons: (1) all of the employees cooperated with the ensuing Security Department investigation and (2) the information utilized by the employees was not "used against the Company's interests" but rather for personal financial gain.[4]

5. It must be concluded from the evidence that Glenn Andrews' main reason for firing ALLEN was based upon the principles of dereliction of duty and untrustworthiness. It cannot be denied that Glenn Andrews also considered the fact that ALLEN filed a lawsuit against SCB and that ALLEN used the proprietary information against SCB even though he was aware of SCB's rules prohibiting the distribution of SCB's proprietary information to an unauthorized individual.

6. Glenn Andrews' legitimate reasons for firing ALLEN are more significantly grounded in ALLEN's violation of SCB's rules and regulations. Glenn Andrews testified that his initial decision was made to fire ALLEN after he reviewed the Security Department's investigative report. However, upon learn-

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[4] ALLEN presented evidence relative to the B-97 incident in support of his claim that his termination was based on racial grounds. The B-97 incident involved fourteen SCB employees', twelve employees were White and two were Black, alleged use of proprietary information, specifically, the private telephone number of Radio Station B-97. All of the employees participated in the Security Department's investigation. However, all of the White employee(s) admitted their involvement and the Black employees denied involvement. The White employees were suspended for four weeks and their performance ratings were reduced. No disciplinary action was taken against the Black employees.

ing that ALLEN's lawyer had indicated that all questions pertaining to the possession of proprietary documents should be directed to the lawyer, an interview of the lawyer was arranged but no information was provided. Glenn Andrews also caused Attorney Enola Fee, a management level attorney with SCB and legal compliance officer, to research the issue of ALLEN's termination. Attorney Fee supplied Glenn Andrews with legal precedence and examples of SCB's termination of previous employees.

It is also noteworthy that the initial investigative report indicated that the proprietary information provided to Attorney J. Courtney Wilson contained information relative to government contracts with the United States Navy, United States Coast Guard, and the Alvin Callendar Air Field.

7. The totality of the circumstances and facts available relative to the unexplained possession of these proprietary documents, the failure of ALLEN to participate in the Security Department's investigation, and SCB's clear rules providing for termination of an employee who disseminates SCB's proprietary documents to unauthorized individuals, provides legal basis absent consideration of the fact that ALLEN was pursuing a lawsuit against SCB to fire ALLEN. Therefore, SCB has proved that it would have made the same decision to fire ALLEN even if it had not taken the illegitimate reason (ALLEN's lawsuit against SCB) into consideration.

Thus, ALLEN's retaliation claim must fall.

Accordingly, IT IS ORDERED that judgment be entered in favor of South Central Bell Telephone Company and against LEMORE ALLEN, dismissing the Complaint and Amended Complaints in this Civil Action.

New Orleans, Louisiana, this 13th day of November, 1991.

[s]_____
LOUIS MOORE, JR.
United States Magistrate Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-3136
Summary Calendar

LEMORE ALLEN,
Plaintiff-Appellant,

VERSUS

SOUTH CENTRAL BELL
TELEPHONE COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the
Eastern District of Louisiana
(CA 86 1240 H)

Before JOLLY, DUHE, and BARKSDALE, Circuit Judges.

PER CURIAM[1]:

This is a "mixed motives" discrimination case which visits this Court for the second time[2]. We affirmed the magistrate

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[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

[2] Carter v. South Cent. Bell, 912 F.2d 832 (5th Cir. 1990).

judge's dismissal of Appellant's racial discrimination claim, but we remanded the retaliatory claim stating that we were "unable to understand the analysis that the magistrate judge used in dismissing Appellant's claim of retaliatory termination." Carter, 912 F.2d at 843. We remanded to the magistrate judge for a determination whether South Central Bell had proven by a preponderance of the evidence that it would have fired Appellant for taking South Central Bell documents even if he had not been involved in litigation against it. We stated Bell's burden of proof by saying that it must "show the dismissal was an appropriate remedy for personal use of proprietary information." Id.

On remand the magistrate judge issued a comprehensive Order and Reasons containing detailed findings and conclusions and held that the burden had been met by a preponderance of the evidence, and that South Central Bell would have fired Appellant regardless of his lawsuit. These findings are entitled to the same deference given to the findings of a district judge. Lockette v. Greyhound Lines, Inc., 817 F.2d 1182,11185 (5th Cir. 1987). We therefore review for clear error[3] and we find no error here.

Since this is a "mixed motives" case, the employer must prove that it would have made the same employment decision even if it had not taken the illegitimate (retaliatory) reason into consideration. Price Waterhouse v. Hopkins, 490 U.S. 228, 241-42 (1989).

In essence, Appellant argues that the magistrate judge's fact findings were inadequate because they did not explicitly address every one of his allegations. This is not, however, necessary. Our mandate required the magistrate judge to determine whether South Central Bell had proven by a preponderance

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[3] Fed. R. Civ. P. 52(a).

of the evidence that termination was appropriate. That is what he did. He noted that the Appellant was aware that employees would be disciplined, including termination, if they disclosed proprietary information to unauthorized personnel. Appellant's attorney was given proprietary information without authority. This proprietary information was used against Bell's interest. Termination was, therefore, appropriate.

Appellant's argument concerning the balancing test employed by the magistrate does not account for the fact that this is a "mixed motives" case. The question is whether Appellant would have been fired for taking the documents even if he had not been involved in the lawsuit against Bell. The Court must, therefore, balance the motives to determine whether the legitimate reason for termination would alone have resulted in the same decision. Carter, 912 F.2d at 843. Appellant's contention that Avery v. Homewood City Bd. of Educ., 674 F.2d 337 (5th Cir. 1982), cert. denied, 461 U.S. 943 (1983), mandates a different result is misplaced. Avery is distinguishable in that in Avery the defendants never offered proof that they would have fired the plaintiff absent the illegitimate reason.

We find that the magistrate judge employed the right test and that the evidence submitted is more than sufficient to sustain Bell's burden.

AFFIRMED.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-3136

LEMORE ALLEN,
Plaintiff-Appellant,

versus

SOUTH CENTRAL BELL
TELEPHONE COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the
Eastern District of Louisiana

ON PETITION FOR REHEARING
(October 19, 1992)

Before JOLLY, DUHE, and BARKSDALE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied. ENTERED FOR THE COURT:

John M Duhe, Jr.
United States Circuit Judge